ABDUL GHANI HAROON

v.

KETUA POLIS NEGARA & ANOTHER APPLICATION (NO 3)

HIGH COURT MALAYA, SHAH ALAM
HISHAMUDIN YUNUS J
[CRIMINAL APPLICATION NOS: 44-9-2001 & 44-10-2001]
30 MAY 2001

ADMINISRATIVE LAW: *Remedies - Habeas corpus ad subjiciendum - Impropriety of arrest - Illegality of further detention - Denial of access to counsel and family members - Whether remedy available - Internal Security Act 1960, ss. 8, 73(1), (3) - Federal Constitution, art. 5(3)*

CONSTITUTIONAL LAW: *Fundamental liberties - Habeas corpus - Impropriety of arrest - Illegality of further detention - Denial of access to counsel and family members - Whether application for habeas corpus should be allowed - Internal Security Act 1960, ss. 8, 73(1), (3) - Federal Constitution, art. 5(3)*

PREVENTIVE DETENTION: *Detention - Grounds for detention - Whether justified - Whether arresting officer provided sufficient particulars - Internal Security Act 1960, ss. 8, 73(1)*

CONSTITUTIONAL LAW: *Fundamental liberties - Right of detained person - Right to be informed of grounds of arrest - Arresting officer did not elaborate on grounds of arrest in affidavit - Whether there was sufficient compliance with art. 5(3) Federal Constitution*

PREVENTIVE DETENTION: *Detention - Further detention - Whether justified - Whether purpose and reasons stated - Whether made prematurely - Whether mala fide - Internal Security Act 1960, paras (a) & (b) of proviso to s. 73(3)*

CONSTITUTIONAL LAW: *Fundamental liberties - Right of detained person - Right of access to family and counsel - Whether denial of such right mala fide - Whether right can be denied if investigations are in progress*

The two applicants herein, one Ghani and one Gobalakrishnan, were detained under s. 73(1) of the Internal Security Act 1960 ('ISA'). Both applied (through their family members) to the court for the writ of *habeas corpus* to challenge their detentions. The applicants were not produced in court. The instant court's earlier ruling on the preliminary issue that the applicants had a legal and a constitutional right to be present at the hearing of their *habeas corpus* applications was reversed by the Federal Court.

Since the applicants' arrests their detentions had been extended twice and they were denied access to their family members and counsels. Apart from applying to the court for their freedom, counsel for the applicants also applied to the court to direct the respondent to grant the applicants their constitutional right of access to counsel.

Held:

[1a] An arresting officer can only justify an arrest by showing the court that the arrest has been carried out strictly in accordance with s. 73(1) read with s. 8 ISA. In the present case, the arresting officers purported to act under s. 73(1) but the affidavits were vague and did not show that there was due compliance with the relevant sections.

[1b] If the arresting officer has reason to believe that the applicant *has acted or is about to act or is likely to act* in a manner prejudicial to the security of Malaysia then the affidavit must state in **what manner** the applicant *has acted or is about to act or is likely to act* in a manner prejudicial to the security of Malaysia. The court is not interested in detailed information. Some reasonable amount of particulars should be provided for the purpose of satisfying the court that there is some basis for the arrest and to enable the detainee who believes he is innocent to defend himself.

[2] The affidavits of the arresting officers here did not sufficiently show that they had informed the applicants of their grounds of arrest pursuant to art. 5(3) of the Federal Constitution. Nowhere in the ISA were the arresting officers exempted from complying with that constitutional requirement. The mention of the words "sebab-sebab" in the affidavit concerned did not go on to elaborate what the grounds were. The affidavit must disclose the grounds. The need to disclose the grounds became all the more imperative since there was a failure to satisfy the court that the arrests were in accordance with s. 73(1) read with s. 8 ISA. Therefore, the court was impelled to uphold that there were no such grounds told to the applicants and that that omission was a breach of art. 5(3) ISA which rendered the arrests and detentions unlawful.

[3] The further detentions of the applicants purportedly pursuant to paras. (a) and (b) of the proviso to s. 73(3) ISA were unlawful. There was no proper compliance due to the following reasons: (i) the affidavits concerned did not state the purpose for the extension of the detentions; and (ii) the said affidavits failed to state the reasons for authorising the further detentions.

[4] The period of sixty days that the police is empowered to detain a person under s. 73(3) ISA is the maximum period permissible. The police do not have the absolute power to detain a person for sixty days. If the police needs to detain a person for the purpose of inquiry for only twenty days, then the detention should only be for the said twenty days and it will be unlawful if they should detain that person for sixty days. At the end of the twenty-day period the person detained is either set free, charged in court for a specific offence or further detained by an order of the Minister pursuant to s. 8 ISA.

[5] Although the personnel authorising the further detention are police officers, their role is somewhat quite similar to that of a magistrate exercising powers of remand under s. 117 of the Criminal Procedure Code. They must make their own judgment without fear or favour. The discretion is solely theirs and their superiors cannot direct or influence them in deciding whether or not to authorise the further detention. But the court must, and indeed has the power to, evaluate the exercise of that discretion.

[6] The detention was *mala fide* by reason of the fact that the joint letter of the Inspector General of Police and the Director of the Special Branch clearly showed that they had prematurely made up their minds to detain the two applicants for a period in excess of the permissible period of thirty days. The letter was dated 20 April 2001 and at the relevant time Ghani had been detained for about nine days which was at the early stage of the para (b) detention. However, the letter also mentioned para (c) detention notwithstanding the fact that detaining a person beyond the para (b) stage could not be done automatically but must be in compliance with the requirements of para (c). The letter thus revealed that the Inspector General of Police and the Director of the Special Branch had ignored the procedural safeguards provided therein.

[7a] The detention was *mala fide* by reason of the deliberate and unreasonable denial of access to family members. Since the day of the arrest and until the last day of the hearing the families had been denied access by the police despite the fact that a formal request had been made to the Inspector General of Police. To deny the detainees and their families access to one another for such a long period of time was cruel, inhuman and oppressive, not only to the detainees but to the families as well. Furthermore, the request was not for a visit immediately after arrest.

[7b] There is no provision in the ISA that confers upon the police the right to deny a detainee access to family members while investigation is in progress. Whatever the allegations against the two applicants might be, there was no justification whatsoever for denying family visits for so long.

[8] The detention was *mala fide* by reason of the deliberate and unreasonable denial of access to lawyers. Since the day of the arrest the lawyers engaged by the respective families had been denied access. Such a denial was not only cruel, inhuman and oppressive but also a blatant violation of the applicants' constitutional rights under art. 5(3) of the Federal Constitution. Here, too, the lawyers were not seeking access to the applicants immediately after their arrests.

[9] The denial of access to lawyers was not only a gross violation of the fundamental rights as enshrined in the Federal Constitution but had also greatly prejudiced the applicants. The court could only make fair judgment after having had the benefit of not only scrutinising the affidavits of the respondent but also the affidavits of the applicants as well. It is elementary justice that the court has to hear both sides. However, as access to their families and lawyers was denied, no affidavits were deposed by the applicants. Therefore, the denial of access to lawyers had led to injustice. Further, there is no requirement in the ISA or the Federal Constitution that access to lawyers should only be given after investigations are completed.

Per curiam:

[1] The police officers responsible for the detentions of the applicants must wake up to the fact that the supreme law of this country is the Federal Constitution and not the ISA.

[2] If the applicants truly believed that they had done no wrong and that from their standpoint they had been framed or persecuted, how were they to present their case in the best possible manner if they were not allowed access to counsel? The denial of right to counsel was not only unjust, but a mockery of the right to apply for *habeas corpus* as guaranteed by art. 5(2) of the Federal Constitution.

[3] Perhaps it is high time for Parliament to consider whether the ISA which was originally meant to counter communist terrorism in the early years of our independence is really relevant to the present day situation of this nation of ours; or, if at all it is to be retained, at least whether its provisions need to be thoroughly reviewed to prevent or minimise the abuses highlighted in the judgment.

[Applications allowed.]

Case(s) referred to:

Associated Press v. National Labour Relations Board [1937] 301 US 103 ***(refd)***
Hashim Saud v. Yahaya Hashim & Anor [1977] 2 MLJ 116 ***(foll)***
Liversidge v. Anderson [1942] AC 206 ***(refd)***
Ooi Ah Phua v. Officer-in-Charge Criminal Investigation, Kedah/Perlis [1975] 2 MLJ 198 ***(refd)***
R v. Home Secretary, ex p Khawaja [1983] 2 WLR 321 ***(refd)***
Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 MLJ 293 ***(dist)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25
Criminal Procedure Code, ss. 117, 365
Federal Constitution, art. 5(2), (3)
Human Rights Commission of Malaysia Act 1999, s. 4(2)(d)
Internal Security Act 1960, ss. 8(1), 16, 73(1)(a), 73(3) prov. (a), (b), (c)

For the applicants - R Sivarasa (Kamarul Hisham, Kandasamy Palaniandy, Saiful Izham, M Moganambal, Hamidzun Khairuddin); M/s Selvam Shanmugam & Partners
For the respondent - Abdul Wahab Mohd SFC (Abdul Rashid Sidin with him)

Reported by Usha Thiagarajah

JUDGMENT

Hishamudin Yunus J:

Encik Abdul Ghani bin Harun and Encik Gobalakrishnan a/l Nagappan are members of the political party, Parti Keadilan Nasional. They had been separately arrested under s. 73(1) of the Internal Security Act 1960 (the "ISA"). Encik Gobalakrishnan was arrested at 11.50pm on 10 April 2001 at Kuah Police Station, Langkawi, whilst Encik Abdul Ghani was arrested at 10.25am on 11 April 2001 at Kuching International Airport.

Since his arrest, the detention of Encik Gobalakrishnan has been extended twice. First it was extended on 11 April 2001 by the authority of Inspector Wong Lang Eng of Police Headquarters, Bukit Aman, for a period of 24 hours. Subsequently it was extended on 12 April 2001 by the authority of ASP Cheah Kee Sam of Police Headquarters, Bukit Aman, for a further period of 28 days.

Since his arrest, the detention of Encik Ghani has been extended twice. First it was extended on 12 April 2001 by the authority of Chief Inspector Eugene Tay of Police Headquarters, Kuching, for a period of 24 hours. Subsequently it was extended on 13 April 2001 by the authority of ASP Cheah Kee Sam of Police Headquarters, Bukit Aman, for a further period of 28 days.

Right until the last day of the hearing of this application (Tuesday 22 May 2001) the family members and the lawyers engaged by their respective families have been denied access by the police department; and so is the Human Rights Commission (SUHAKAM), notwithstanding the clear provisions of the Human Rights Commission of Malaysia Act 1999, in particular, s. 4(2)(d).

The families, on behalf of the two detainees, have separately applied to this court for a writ of *habeas corpus*, through Criminal Application 44-9-2001 and Criminal Application 44-10-2001. The supporting affidavit of Encik Ghani is deposed by his wife Puan Roslijah binte S. Syed, whilst the supporting affidavit for Encik Gobalakrishnan's application is deposed by his brother, Encik Deven a/l Nagappan. By consent, these two applications have been consolidated and are being heard together.

The common respondent in the applications is the Inspector General of Police.

The affidavits in both the cases before me are more or less similar in contents. So for the sake of convenience, to a large extent in this judgment I will be relying on the affidavits in the case file of Encik Ghani (44-9-2001) but whatever findings, rulings, criticisms or views that I make will equally apply to the case of Encik Gobalakrishnan.

Apart from applying to the court for their freedom, Encik R. Sivarasa, on behalf of the two applicants, also applies to the court to direct the respondent to grant the applicants their constitutional right of access to counsel.

Now, throughout the whole proceeding of this application both the applicants were not present in court. This requires some explanation. A few days before the commencement of the hearing on 23 April 2001, the deputy registrar of this court had caused to be issued and served on the respondent a "Notice to Produce" so that the applicants could be present at the hearing of their applications. This is the normal practice of this court in all *habeas corpus* proceedings. But the respondent has failed to comply with the order. The respondent has no intention to disobey the court's order. The position taken by the respondent is that, in law, the applicants have no right to be present at the hearing of their applications.

Thus there was a preliminary issue before this court: In law do the applicants have the right to be present at the hearing of their applications? Encik Sivarasa for the applicants insisted that they have the right to be present. The learned senior federal counsels, Encik Abdul Wahab and Encik Abdul Rashid Sudin, on the other hand, submitted that they have no right.

After hearing arguments from both sides for several days, I had reserved my decision to Friday 4 May; and that decision was delivered on the appointed day. In my decision I ruled that, by virtue of cl. (2) of art. 5 of the Federal Constitution, the right to apply to the High Court for a writ of *habeas corpus* is not merely a legal right but also a constitutional right available to any person who believes that he has been unlawfully detained. The right being a constitutional right, it should follow that he has every right to be present in court at the hearing of his application. In other words, the right to be present is a constitutional right implicit in cl. (2) of art. 5.

Accordingly I ordered the two applicants to be produced before me on the morning of 8 May. However, in the morning of that day, before the applicants could be produced, on the application of the respondent, my ruling that both the applicants have the right to be present in court during the hearing of their application was stayed by Federal Court judge, YA Dato' Abdul Malek bin Ahmad, and on 16 May a bench of the Federal Court reversed my ruling.

I respect and I am bound by the ruling of the Federal Court.

Next, I shall say a few words on *habeas corpus*. The writ of *habeas corpus* has its origins in English law. It is the most famous writ in English law. It is called the great writ of liberty. The origin and history of the writ are lost in antiquity. But it takes its name from the two mandatory Latin words *habeas* and *corpus*. There is, however, ample evidence that it was in use before the days of Magna Carta. Although *habeas corpus* is a writ of great antiquity it did not attain its modern form as a mechanism for securing the liberty of the subject until the seventeenth century, when its application was one of the aspect of the constitutional struggle between the English King and his Parliament.

The great English judge, the Hon. Lord Denning, in his first Hamlyn Lectures called Personal Freedom spoke of the writ of *habeas corpus*. This is what he said:

> The law says that no man is to be imprisoned except by judgment of the King's courts or whilst awaiting trial by them. This freedom is safeguarded by the famous writ in England, the writ of *habeas corpus*. Whenever any man in England is detained against his will, not by sentence of the King's courts, but by anyone else, then he or anyone on his behalf is entitled to apply to any of the judges of the High Court to determine whether his detention is lawful or not. The court will then, by this writ, command the gaoler or whoever is detaining him, to bring him before the court; and, unless the detention is shown to be lawful, the court will at once set him free.

> This was not always so. In 1627, when the executive Government cast Sir Thomas Darnel and four other knights into prison because they would not subscribe money for the King, the Court of King's Bench, to its disgrace, held that if a man were committed by command of the King he was not to be delivered by *habeas corpus.* Those were the evil days when the judges took their orders from the executive. But the people of England overthrew the Government which so assailed their liberties, and passed statutes which gave the writ its present power. Never hereafter have the judges taken their orders from anyone.

The relevant laws governing the writ of *habeas corpus* are, firstly, art. 5(2) of the Federal Constitution which provides:

> **Liberty of the person.**
>
> 5. (1) ...
>
> (2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

The above constitutional guarantee must be read together with s. 365 of the Criminal Procedure Code, s. 25 of the Courts of Judicature Act 1964 and para. 1 of the Schedule of the same Act.

By virtue of cl. (2) of art. 5 above, the right to apply to the High Court for a writ of *habeas corpus* is not merely a legal right but also a constitutional right available to any person who believes that he has been unlawfully detained.

Judges are the protectors of fundamental liberties of the subjects as enshrined in the Constitution. It is a sacred trust that they must vigilantly uphold. In this connection, I am reminded of what has been said by Lord Atkin in his dissenting judgment in *Liversidge v. Anderson* [1942] AC 206, 244.

> I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive ... In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

And there is also the warning of Sutherland J in his dissenting judgment in *Associated Press v. National Labor Relations Board* [1937] 301 US 103 at 141 to the effect:

> ... the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.

Now, the cardinal principle is that every detention is *prima facie* unlawful and the burden of proof is on the detainer to justify it (*R. v. Home Secretary, ex p. Khawaja* [1983] 2 WLR 321).

In the present case, it is my judgment that the detention of the two applicants by the police is unlawful.

I so hold for the following grounds.

Non-compliance With Section 73(1) Of The ISA

First, the arresting officers have failed to justify the arrest. In law the arresting officers can only justify the arrest by showing the court that the arrest was carried out strictly in accordance with s. 73(1) read with s. 8 of the ISA. Section 73(1) reads:

> **Power to detain suspected persons.**
>
> 73(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe –
>
> (a) that there are grounds which would justify his detention under section 8; and
>
> (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

Section 8(1) provides:

> **Power to order detention or restriction of persons.**
>
> 8.(1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as "a detention order") directing that that person be detained for any period not exceeding two years.

In the present case, upon examining the affidavits, I find that there was no strict compliance. The arresting officers purported to act under s. 73(1) but the affidavits are vague in nature and do not sufficiently show that there has been due compliance with the requirements of s. 73(1) read with s. 8.

Paragraphs 4 and 5 of the arresting officer's affidavit merely states:

> 4. Saya dengan sesungguhnya menyatakan daripada maklumat yang diterima berhubung dengan kegiatan orang tahanan bernama ABDUL GHANI HAROON (selepas ini disebut sebagai "Pemohon"), saya mempunyai sebab-sebab untuk mempercayai bahawa terdapat alasan-alasan yang boleh mewajarkan Pemohon ditahan di bawah Seksyen 8 Akta Keselamatan Dalam Negeri, 1960 (Akta 82).
>
> 5. Saya juga sesungguhnya mempercayai Pemohon telah bertindak dengan cara yang boleh memudaratkan keselamatan negara.

(Similarly worded paragraphs are contained in the affidavit of the arresting officer in the case of Gobalakrishnan)

In my judgment, the above averment is inadequate. The affidavit of the arresting officer must state:

(a) whether he has reason to believe that the detention of the applicant was necessary with a view to preventing him from acting in a manner prejudicial to the security of Malaysia or any part thereof; or

(b) whether he has reason to believe that the detention of the applicant was necessary with a view to preventing him from acting in a manner prejudicial to the maintenance of essential services in Malaysia or any part thereof; or

(c) whether he has reason to believe that the detention of the applicant was necessary with a view to preventing him from acting in a manner prejudicial to the economic life of Malaysia or any part thereof.

The ground need not be singular. The grounds could be multiple, for example, it could be a combination of grounds (a) and (b); or even a combination of grounds (a), (b) and (c). But be it singular or multiple, the grounds must be cleary stated in the affidavit. The arresting officer in his affidavit cannot simply parrot the wordings of the provision of s. 73(1)(a), as was done in the present case. He must show in his affidavit that he has directed his mind to the requirements of s. 8.

And, in addition, since there is the word "and" and not "or" at the end of limb (a) of sub-s. (1) of s. 73, therefore, limb (b) of sub-s. (1) of s. 73 must be read conjunctively with limb (a), and not disjunctively. In other words, the affidavit of the arresting officer must further state:

(a) whether he has reason to believe that the applicant **has acted or is about to act or is likely to act** in a manner prejudicial to the security of Malaysia or any part thereof; or

(b) whether he has reason to believe that the applicant **has acted or is about to act or is likely to act** in a manner prejudicial to the maintenance of essential services in Malaysia or any part thereof; or

(c) whether he has reason to believe that the applicant **has acted or is about to act or is likely to act** in a manner prejudicial to the economic life of Malaysia or any part thereof; or

Likewise, these additional grounds can be multiple in nature, for example it could be a combination of, say, (a) and (c).

As to compliance with limb (b) of sub-s. (1) of s. 73, the affidavit must provide sufficient particulars. For example, if it is a case of (a) (that the arresting officer has reason to believe that the applicant **has acted or is about to act or is likely to act** in a manner prejudicial to the security of Malaysia) then the affidavit must state in what manner the applicant **has acted or is about to act or is likely to act in a manner prejudicial to the security of Malaysia.** The court is not interested in detail information (least of all confidential or secret information), nor is the court, at this initial stage, interested in whatever evidence the arresting officer has; but the court has to know the basic particulars of what the applicant is alleged to have done and considering the phrase "prejudicial to the security of Malaysia" is too general or vague in nature (so also are the phrases "prejudicial to the maintenance of essential services of Malaysia" and "prejudicial to the economic life of Malaysia"), the arresting officer must, in his affidavit, furnish, not necessarily detailed particulars, but **some** reasonable amount of particulars not only for the purpose of satisfying the court that he has some basis for the arrest but also to be fair to the detainee – to enable the detainee, who believes that he is innocent, to defend himself.

Encik Abdul Wahab, the learned senior federal counsel, submitted that the grounds and particulars cannot be disclosed by reason of s. 16 of the ISA, citing *Theresa Lim Chin Chin & Ors. v. Inspector General of Police* [1988] 1 MLJ 293. *Theresa Lim* can be distinguished because there what was required to be disclosed by the applicant was evidence or information relating to the arrest whereas in our case the court, as I have said earlier, is not interested in evidence or information but in basic particulars. Further in *Theresa Lim* the arresting officer in his affidavit had stated that they are not prepared to disclose the information or evidence to the court by reason of national interest and pleading s. 16. But in our case no such privilege is claimed in the affidavit of the arresting officer. On the contrary the arresting officer, in para. 7 of his affidavit, claims to have informed the applicant of his grounds of arrest. Moreover, in *Theresa Lim* the Supreme Court did not embark on a detailed analysis as to the procedural requirements of the empowering provisions, namely, s. 73(1) and s. 8.

Non-Compliance With Article 5(3) Of The Constitution

My second ground is that the affidavits of the arresting officers do not sufficiently show that there has been compliance with art. 5(3) of the Federal Constitution, that is, the requirement that they must inform the applicants of the grounds of arrest. Nowhere in the ISA are the arresting officers exempted from complying with this constitutional requirement.

Article 5(3) states:

> (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

However, the affidavit of the arresting officer merely states:

> 7. Sebaik sahaja saya menangkap Pemohon, saya telah memberitahu dan menerangkan kepada Pemohon dalam bahasa Inggeris yang mudah sebab-sebab Pemohon ditangkap. Saya sesungguhnya mempercayai Pemohon telah memahami penerangan saya.

It is to be noted that the affidavit merely mentioned "sebab-sebab" but does not go on to elaborate as to what the grounds (sebab-sebab) were. The affidavit must disclose the grounds. The need to disclose the grounds becomes all the more imperative if one were to consider the fact that the arresting officer in paras. 4 and 5 of his affidavit has failed to satisfy the court that the arrest was in accordance with s. 73(1) read with s. 8. In the circumstances I am impelled to hold that there were no grounds told to the applicant, and such an omission was a breach of art. 5(3), and this breach renders the arrest and detention unlawful.

Non-compliance With Paragraphs (a) And (b) Of The Proviso To Subsection (3) Of Section 73 Of The ISA

My third ground is that the further detention of the applicants purportedly pursuant to s. 73(3)(a) and 73(3)(b) of the ISA was unlawful. Paragraphs (a) and (b) of the proviso to sub-s. (3) reads:

(a) he shall not be detained for more than twenty-fours except with the authority of a police officer of or above the rank of Inspector;

(b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent.

There was no proper compliance with paras. (a) and (b) of the proviso to sub-s. (3) of s. 73. I say so for two reasons. First, the affidavits of the respective authorizing officers do not say anything about the purpose of the extension of the detention. They must state the purpose of the pending inquiries and the purpose must relate to the "reason to believe" as prescribed by s. 73(1) read with s. 8. I do not propose to repeat what I have said earlier in dealing with the initial arrest. Taking the affidavit of Chief Inspector Eugene Tay, for example, paras. 3 and 4 of his affidavit merely states:

> 3. Pada 12.4.2001, jam 8.00 pagi, saya telah memberi kuasa penahanan ke atas orang tahanan bernama ABDUL GHANI BIN HAROON (KP. 650124-07-5181) (selepas ini disebut sebagai 'Pemohon") dilanjutkan melebihi 24 jam mulai 12.4.2001 jam 10.25 pagi satu kuasa yang diberikan kepada saya di bawah peruntukan Seksyen 73(3)(a) Akta Keselamatan Dalam Negeri, 1960 bagi tujuan meneruskan siasatan terhadap pemohon.
>
> 4. Satu salinan Borang SB. Form 28A (Revised) yang memberi kuasa untuk penahanan lanjutan ke atas pemohon di bawah peruntukan Seksyen 73(3)(a) Akta Keselamatan Dalam Negeri 1960 yang telah disahkan oleh Superintenden Polis SHAMSUDDIN B HJ ARSHAD, Nombor Polis G/5199, seorang Pegawai Kanan Polis yang memegang jawatan sebagai Pegawai Turus E6B di Cawangan Khas, Ibu Pejabat Polis Di Raja Malaysia, Bukit Aman, Kuala Lumpur yang mempunyai di dalam jagaannya dokumen tersebut, dilampirkan sebagai eksibit "ET-1".

The form 28A mentioned in the above para. 4 reads:

> **INTERNAL SECURITY ACT, 1960 (REVISED 1972)**
> **AUTHORISATION OF DETENTION UNDER SECTION 73(3)(a) OF THE INTERNAL SECURITY ACT, 1960 (REVISED 1972)**
>
> WHEREAS I, EUGENE TAY (1/9726) CHIEF INSPECTOR of Police, of Police Headquarters KUCHING, SARAWAK am satisfied with regard to the case of ABDUL GHANI BIN HAROON NRIC No. 650124-07-5181 who was arrested under Section 73(1) of the Internal Security Act, 1960 on 11 April 2001-1025 hours in KUCHING INTERNATIONAL AIRPORT, KUCHING that the necessary inquiries cannot be completed within the period of 24 hours, now therefore, in exercise of the powers vested in me by Section 73(3)(a) of the Internal Security Act 1960, I hereby authorize the further detention of the abovenamed ABDUL GHANI BIN HAROON for an additional period of 24 hours with effect from 12 APR 2001-1025 hours.
>
> Signature
> (EUGENE TAY)
> CHIEF INSPECTOR OF POLICE
>
> Time: 0800 hours
> Date: 12 APR 2001

Now, first and foremost, the above form is not a statutorily prescribed form and the affidavit does not say that the form is prescribed by the police department. Be that as it may, it will be observed that the form merely states that "... the necessary enquiries cannot be completed within the period of 24 hours,". It does not go on, as it should, to state the purpose of the inquiries.

Secondly, the affidavit fails to state the reasons for authorising the further detention. The authorising officer must record his reasons in the form and they must also be stated in the affidavit. These must be done not only to enable the court to evaluate the reasons for the authorisation so as to rule on its reasonableness and legality but also to ensure that the powers to authorise are not exercised mechanically but in a responsible manner. For example, ASP Cheah Kee Sam who authorised the further detention of Abdul Ghani and Gobalakrishnan for an additional period of 28 days should state in the form as well as in his affidavit his reasons as to why investigation or inquiries cannot be completed within the permissible period of 48 hours, and why a further 28 days was required. The court does not require a detailed minute-by-minute account of the detention but some plausible explanation must be given. It is, however, true that s. 73(3) empowers the police to detain the applicant up to a period of 60 days; but this period of 60 days is the maximum period permissible: the police do not have the absolute power to detain a person for sixty days. If, for the purpose of the inquiry, the police needs to detain the person for, say, only 20 days, the police can only detain the person for 20 days. It would then be unlawful for the police to detain the person for 60 days. And at the end of the twenty-day period, one of the following must be done, depending on the circumstances of the case:

(a) the person detained is set free; or

(b) the person detained is charged in court for a specific offence; or

(c) the person detained is further detained by an order of the Minister made pursuant to s. 8 of the ISA.

I must add that, in my view, the power to authorise further detention under paras. (a), (b) and (c) of the proviso to sub-s. (3) of s. 73 must be exercised reasonably and fairly and is reviewable by the court in a *habeas corpus* proceeding.

To my mind, the purpose of paras. (a), (b) and (c) of the proviso to s. 73(3) is to provide a built in departmental safeguards against possible abuse of the powers of arrest and detention under the ISA. In order to achieve this purpose, the officers concerned must be objective, independent minded and professional in their approach. Although the personnel authorising the further detention are police officers, nevertheless, their role is somewhat quite similar to that of a

magistrate exercising powers of remand under s. 117 of the Criminal Procedure Code. They must make their own judgment without fear or favour. In other words, the discretion is solely theirs and their superiors cannot direct or influence them in deciding whether or not to authorise the further detention. But the court must and, indeed, has the power to evaluate the exercise of the discretion.

Decision To Further Detain Under Paragraph (c) Of The Proviso Made Prematurely

My fourth ground is that the detention is *mala fide* by reason of the fact that the Inspector General and the Director of Special Branch had prematurely made up their mind to detain the two applicants for up to a period in excess of the permissible period of 30 days (paras. (a) and (b) authorisation). This is clearly shown by the joint letter of the Inspector General and Director of Special Branch (signed on their behalf by one DSP Philip) of 20 April 2001 (exh. PS2 of encl. 5) which states:

> Siasatan ke atasnya masih diteruskan di bawah Seksyen 73(3)(a)(b) dan (c) Akta Keselamatan Dalam Negeri (AKDN), 1960. (emphasis added.)

As the letter was dated 20 April, therefore, at the time the letter was written Encik Ghani has been detained for about nine days, meaning that the detention was then at the early stage of the "para. (b)" detention (which authorised a further detention of 28 days). But the letter, as can be seen, also mentioned of a para. (c) detention meaning that the respondent and the Director of Special Branch had already made up their minds to detain the applicants well beyond the para. (b) stage notwithstanding the fact that detaining a person beyond the para. (b) stage cannot be done automatically but must be in compliance with the requirement of para. (c) which states:

> (c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General in that behalf, who shall forthwith report the same to the Minister.

The letter thus reveals that the Inspector General and the Director of Special Branch have ignored the procedural safeguards as provided by para (c) of the proviso to sub-s. (3) of s. 73.

Denial Of Access To Family Members

My fifth ground is that the detention is *mala fide* by reason of deliberate and unreasonable denial of access to family members. Since the day of arrest (10 and 11 April 2001) and until the last day of the hearing (Tuesday, 22 May 2001), the families have been denied access by the police despite the fact that a formal request has been made to the Inspector General by the families through their solicitors.

The joint letter of the Inspector General and the Director of Special Branch states:

> Sebarang lawatan samada dari keluarga mahupun daripada peguam daripada firma tuan akan menjejaskan proses penyiasatan polis yang kini sedang dijalankan.

From the day of arrest right up to the last day of hearing, all in all about 40 days have passed, and the family and solicitors were still awaiting a reply from the Inspector General. In my view, to deny the detainees and their family access to one another for such a long period is cruel, inhuman and oppressive, not only to the detainees but to the families as well.

The reply by the police department to the family and solicitors, that visits by family members cannot be allowed for the time being because that would impede police investigation that is in progress, is unacceptable. The request was not for a visit **immediately** after arrest. What harm could a brief visit by immediate family members do to police investigation? The visit can be closely monitored so as to be under the watchful eyes of police officers. The law, especially a law that affects fundamental rights, should not be enforced blindly. It must be interpreted and carried out as humanely as possible. Encik Abdul Rashid Sudin, the learned senior federal counsel, submitted that the police have the right to deny access as long as investigation is in progress. With respect, this court does not understand that sort of reasoning. There is no provision under the ISA that confers upon the police such drastic powers. Whatever the allegations against the two applicants might be, I fail to see any justification whatsoever for denying family visit for so long.

Denial Of Access To Lawyers

My final ground is that the detention is *mala fide* by reason of deliberately and unreasonably denying access to lawyers by the respondent. Since the day of arrest the lawyers engaged by the families have been denied access. Such a denial is not only cruel, inhuman and oppressive, it is also a blatant violation of the detainees' constitutional rights under art. 5(3) of the Constitution which stipulates:

> 5.(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

In *Ooi Ah Phua v. Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198, Suffian LP said:

With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The interests of justice is as important as the interests of arrested persons and it is well-known that criminal elements are deterred most of all by the certainty of detection, arrest and punishment.

With respect I agree with the view of Bhide J in *Sundar Singh v. Emperor* (AIR [1954] Rajasthan 241) who said at page 947:

> The right of a prisoner to have access to legal advice must of course be subject to such legitimate restrictions as may be necessary in the interests of justice in order to prevent any undue interference with the course of investigation. For instance a legal adviser cannot claim to have interviews with a prisoner at any time he chooses. Similarly, although ordinarily a member of the Bar may be presumed to understand his responsibility in the matter, if there are any good reasons to believe that a particular pleader has abused or is likely to abuse the privilege, that pleader may be refused an interview. But in such cases the police must of course be prepared to support their action on substantial grounds.

In *Hashim bin Saud v. Yahaya bin Hashim & Anor.* [1977] 2 MLJ 116 Raja Azlan Shah FJ (as His Highness then was) said (at p. 118):

> As in Canada we have Bills of Rights. However, the position in this country seems to be that the pretrial right of an arrested person to be allowed to consult a lawyer is merely one particular manifestation of the general right to be allowed to consult and be defended by a legal practitioner of his choice. (art. 5(3) of the Constitution). Such right starts right from the day of his arrest but it cannot be exercised immediately after arrest if it impedes police investigation or the administration of justice: see *Ooi Ah Phua v. Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198. The position seems to be the same in India: see *Moti Bai v. The State A.I.R.* [1954] Raj. 24. We therefore did not agree with the proposition of law propounded by the learned judge that the right of counsel could only be exercised after the completion of the period of police investigation under section 117 CPC. That is too narrow a proposition. In our view it is at the police station that the real trial begins and a court which limits the concept of fairness to the period of police investigation is completed recognizes only the form of criminal justiciable process and ignores its substance.

At a later part of the judgment, the learned judge ruled on the burden of proof in the following terms:

> The onus of proving to the satisfaction of the court that giving effect to the right to counsel would impede police investigation or the administration of justice falls on the police.

In the present case, it is to be observed that the lawyers engaged by the families were not seeking access **immediately** after the arrest. The letter of Tetuan Selvam Shanmugam & Partners was dated 17 April 2001 and the reply by the police department was dated 20 April 2001. Paragraph 2 of Encik S. Philip's letter written on behalf of the respondent and the Director of Special Branch to the solicitors engaged by the families of the detainees reads:

> 2. Adalah dimaklumkan bahawa penama di atas telah ditangkap di bawah seksyen 73(1) Akta Keselamatan Dalam Negeri (AKDN), 1960 pada 11 April 2001 kerana mempunyai sebab-sebab untuk mempercayai dia telah bertindak dengan apa-apa cara yang mendatangkan mudarat kepada keselamatan Malaysia dan juga ada alasan-alasan untuk menjustifikasikan penahanannya. Siasatan ke atasnya masih diteruskan di bawah seksyen 73(3)(a), (b), (c) Akta Keselamatan Dalam Negeri (AKDN), 1960. Oleh yang demikian, adalah tidak wajar untuk pihak keluarga dan peguam melawat orang tahanan di peringkat ini. Sebarang lawatan samada dari keluarga mahupun daripada peguam daripada firma tuan akan menjejaskan proses penyiasatan polis yang kini sedang dijalankan. Pihak kami akan memberitahu sebaik sahaja selesai penyiasatan terhadap beliau.

This denial of access to lawyers is not only a gross violation of the fundamental rights as enshrined in the Constitution but has also greatly prejudiced the applicants in the present application. For example, consider this aspect. The arresting officers in their respective affidavits have averred that they have informed the applicants of the grounds of arrest as soon as possible after the arrest. In other words, the claim is made that they have complied with the first limb of art. 5(3). How is this court to verify these claims? This court can only make a fair judgment after having had the benefit of not only scrutinizing the affidavits of the respondent but also the affidavits of the detainees as well. It is elementary justice that the court has to hear both sides. But then there are no affidavits deposed by the applicants. And it is due to no fault of theirs: there are no affidavits filed by them simply because right until the last day of hearing, a period of about 40 days, the lawyers and family members have been denied access to them. Thus the denial of access to lawyers has led to injustice. Encik Rashid Sudin has submitted that the denial of the right to counsel is permissible as long as investigation is ongoing. With respect, whatever might be the allegations against them it is clearly unlawful to deny them of the constitutional guarantee for such a long period. Those police officers responsible for the detention of the applicants must wake up to the fact that the supreme law of this country is the Constitution and not the ISA.

The above is just one aspect of the matter. Now, if the applicants truly believe that they have done no wrong at all, and that from their standpoint they have been framed or persecuted, how are they to present their case in the best possible manner if they are not allowed access to counsel? This denial to counsel is not only unjust: it also makes a mockery of the right to apply for *habeas corpus* as guaranteed by art. 5(2).

The reason given in the reply for the denial is that police investigation under s. 73(3)(a), (b) and (c) of the ISA was still in progress, and that any visit by family members or lawyers would impede police investigation. Although the reply by the police department stated that the solicitors would be informed in due course after police investigation is completed, yet right until the last day of the hearing the lawyers have yet to receive a reply from the respondent.

The letter of the respondent of 20 April, as I have just read out, is most unsatisfactory. Why is there a need for police investigation to be completed first before access to lawyers can be accorded? There is no such requirement either in the ISA or the Constitution that access to lawyers would be given only after investigation is completed. The police should heed the *dicta* of Raja Azlan Shah in *Hahim bin Saud* to the effect (at p. 118):

> In our view it is at the police station that the real trial begins and a court which limits the concept of fairness to the period of police investigation is completed recognizes only the form of criminal justiciable process and ignores its substance.

By reason of the above grounds, in particular the last two grounds, with the greatest respect and in all humility, perhaps it is high time for Parliament to consider whether the ISA, which was originally meant to counter Communist terrorism in the early years of our independence, is really relevant to the present day situation of this nation of ours; or, if at all it is to be retained, at least whether its provisions need to be thoroughly reviewed to prevent or minimise the abuses which I have highlighted in this judgment.

By reason of the above six grounds, the application of the applicants is allowed. I therefore in accordance with art. 5(2) of the Constitution order that the applicants be produced before this court at 3.30pm today to be released.

[Applications allowed.]